Petition

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1981

CLEVE CANHAM,
Petitioner,

vs.

OBERLIN COLLEGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

Two Questions relating to litigation under Title VII of the Civil Rights Act of 1964 as amended are presented in this Petition. First is whether the improper determination that a claimant has not proved a prima facie case is reversible error. Second is what is necessary for an employer to satisfy its burden of articulating legitimate non-discriminatory reasons in response to a proven prima facie case.

TABLE OF CONTENTS

Questions Presented 1
Table of Authorities III
Lower Court Opinions 1
Basis for Jurisdiction 2
Federal Statute Involved 2
Statement of the Case 2
Reasons Why the Petition Should Be Granted 5
Appendix A—Trial Court Decision A1
Appendix B—Appellate Court Decision A7

TABLE OF AUTHORITIES

Cases

Blizard v. Fielding, 572 F.2d 13 (1st Cir. 1978) 7
McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 5, 6
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 5, 6, 7, 8
Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977) 7

Statutes

42 U.S.C. §2000e et seq. 2, 5

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LOWER COURT OPINIONS

Written opinions in this case were delivered by the Honorable Leroy J. Contie of the United States District Court for the Northern District of Ohio and by the United States Court of Appeals for the Sixth Circuit. Judge Contie's opinion is attached hereto as Appendix A and the Circuit Court's opinion is attached as Appendix B. To the undersigned's knowledge neither opinion was reported.

BASIS FOR JURISDICTION

Review is requested of the judgment of the Sixth Circuit Court of Appeals. This judgment was entered on December 22, 1981. Jurisdiction of this Court to review this decision is conferred pursuant to 28 U.S.C. §1254(1).

FEDERAL STATUTE INVOLVED

This petition involves interpretation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e et seq.).

STATEMENT OF THE CASE

In late 1974, petitioner, Cleve Canham ("Canham") was unemployed. Until April, 1974, he had been Sunday Editor for the Lorain Journal for about three (3) years. Prior to working at the Lorain Journal Canham had served in various capacities for several other newspapers throughout the country. By virtue of his employment with the Lorain Journal, Canham and his family had settled in the Oberlin area.

In the fall of 1974, Canham's wife, searching for employment for herself, checked the job postings at Oberlin College ("Oberlin"). Among the openings listed there was Assistant Editor of the Oberlin Alumni Magazine. Mrs. Canham told her husband of this opportunity. Shortly after becoming aware of this employment possibility Canham submitted a written application dated November 15, 1974 to Oberlin.

Canham was then contacted by Philip Tear ("Tear"), Editor of the Oberlin Alumni Magazine. Tear requested

that Canham appear for a personal interview. Canham complied with this request. During the course of this interview Tear told Canham that he was the best candidate Tear had seen. Tear's high opinion of Canham was verified by a written ranking of candidates Tear prepared on or about December 2, 1974. This ranking listed Canham as the number one candidate for the Assistant Editor position. Moreover, in this document, entitled "Recruitment and Appointment Activity Record", Tear specifically recommended that Canham be hired.

Having been thus encouraged by Tear during the interview, Canham called Tear about a week to ten days later. During the course of this conversation Tear confirmed that Canham had been recommended for the job but that Oberlin's Affirmative Action office had given Tear's recommendation a negative review. The Affirmative Action office's position is reflected on the face of the December 2, 1974 ranking of candidates and is stated explicitly in the December 4, 1974 memorandum from Affirmative Action officer, Karen Gorsline ("Gorsline") to Tear.

Gorsline's memorandum argues that, despite Tear's expressed preference for Canham because of Canham's training and experience in journalism, the candidate ranked number 2 (a black female) was equally well qualified and thereby entitled to the job. Gorsline's memorandum states:

> "The principles of Affirmative Action require that where two candidates are equally well qualified by criteria set by the recruiter and under an Affirmative Action goal, that the *woman or minority is to be given preference.*" (Emphasis Added).

Tear also advised Canham that despite Gorsline's position Tear would continue to recommend Canham for the job.

In addition Tear told Canham that authorization had been granted to hire Canham as Assistant Editor on an interim basis. In December, 1974, Canham assumed the job in this interim capacity and continued to work until February, 1975. During Canham's temporary tenure as Assistant Editor, Tear abandoned his efforts to hire Canham on a permanent basis. In early February, 1975, Tear prepared a new ranking of candidates. In this second ranking the black female formerly ranked number 2 (Chaille Maddox) was elevated to number 1 and recommended for the job. Canham was dropped to number 4 behind two other women. Maddox refused the job when it was offered to her. Jane Spiegelberg, a white female, was ultimately given the job. Canham's application was formally rejected by Oberlin.

Canham filed a timely charge of discrimination because of his sex against Oberlin with the Equal Employment Opportunity Commission ("EEOC"). On January 4, 1979, Canham received a Notice of Right to Sue Letter from the EEOC. On February 1, 1979, within the ninety (90) day statutory period, Canham filed his complaint in this action.

On July 5, 1979 this case was tried before the Honorable Leroy J. Contie, Jr. of the United States District Court for the Northern District of Ohio. Briefs and Reply Briefs were filed by both sides. On January 16, 1980 Judge Contie issued his Memorandum Opinion and Order, and entered judgment in favor of Oberlin. A timely appeal from that judgment was filed on February 8, 1980. The United States Court of Appeals for the Sixth Circuit issued its opinion affirming Judge Contie's decision on December 22, 1981.

REASONS WHY THE PETITION SHOULD BE GRANTED

The two questions presented by this Petition are general in nature and affect most, if not all, disparate treatment discrimination cases arising under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e et seq.) ("Title VII"). Neither of these questions has been fully determined by this Court. A uniform resolution of both issues would be of great assistance in future Title VII litigation.

First Canham maintains that the courts below improperly held that Canham failed to satisfy his initial burden of proving a prima facie case. This Court has allowed that the burden of proving a prima facie case is "not onerous." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The decision of the trial court that Canham did not make out a prima facie case is based on one totally inaccurate premise and one unduly restrictive interpretation of a Title VII plaintiff's burden. This restrictive interpretation by the trial court and its affirmance by the circuit court is at odds with the sense of *Burdine*. Also, Canham contends that this Court should adopt the position that a proven failure of a trial court to properly resolve the question of the presentation of a prima facie by a Title VII plaintiff is in and of itself reversible error.

Judge Contie proffered two (2) bases for his decision that Canham had not proved a prima facie case of discrimination. Judge Contie first maintained that since Canham did not belong to a racial minority he was not a member of a "protected class" as required by *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Confining *McDonnell-Douglas* to cases of race discrimination only is

plainly wrong. In *Burdine* this Court, explicitly and implicitly extended the *McDonnell-Douglas* prima facie case formula to cases involving sex discrimination.

In its decision affirming the trial court, the circuit court did not even address the "protected class" issue. Instead the circuit court focused on Judge Contie's second proffered basis for concluding that Canham had not satisfied his burden, that he had not shown he was qualified for the job in question. As stated by the circuit court:

> "The district court found that Oberlin's decision not to hire the appellant was based on his unsatisfactory performance during the trial period of December 1974-February 1975. The court also found that appellant's journalism experience may have rendered him over qualified, rather than qualified, for the job, and that the other candidates possessed an important qualification, familiarity with the Oberlin campus, which the appellant did not have."

Canham respectfully submits that these holdings have converted the *McDonnell-Douglas* requirement that, in the first instance, the claimant need only show his ability to do the job to a far more severe obligation that the claimant as part of the prima facie case, show he was the *most* qualified. Such a formulation disrupts the tripartite proof sequence so carefully constructed by *McDonnell-Douglas* and its progeny. The question of relative qualifications of applicants is a factor to be considered in the second stage of proof, the employer's presentation of legitimate reasons for its decisions. By telescoping the two proof burdens the trial and appellate courts deprived Canham of the advantages secured for a Title VII claimant through the carefully constructed order of proof first set forth in *McDonnell-Douglas*. Since each of the three (3) divisions of the Title VII proof structure are of equal im-

portance the failure to properly deal with any one fatally affects the ultimate decision. The Court of Appeals for the First Circuit has held that the failure of a trial court to properly evaluate a plaintiff's showing of a prima facie case justified remand because the appeals court could not:

> ". . . be sure that the district court, had it first found a prima facie case, would have evaluated defendant's reasons for not hiring plaintiff precisely as it did." *Blizard v. Fielding*, 572 F.2d 13, 15 (1st Cir. 1978)

Canham believes this case is an appropriate vehicle for the general adoption of the foregoing rule.

As an alternative finding, Judge Contie found, and the appellate Court affirmed, that Oberlin had "articulated" legitimate, non-discriminatory reasons for refusing to hire Canham. The question raised here, in light of the broad, subjective and non-specific "shortcomings" voiced by Oberlin, is how specific an employer must be in satisfying its burden of rebutting a claimant's prima facie case. In *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977) the Court of Appeals for the Fifth Circuit called for a degree of specificity on the employer's part fearing,

> "If an employer need only articulate—not prove—a legitimate, non-discriminatory reason for his action, he may compose fictitious, but legitimate reasons for his actions."

These fears were addressed by this Court in *Burdine*. The level of specificity sought by the court in *Turner* was not adopted but more than articulation alone was called for.

> "[T]he defendant's explanation of its legitimate reasons must be clear and reasonably specific. This obliga-

> tion arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext." 450 U.S. at 258.

Here Oberlin produced one witness who, without stating anything even reasonably specific, said he felt Canham was not doing a good job. Were this enough, as found by the lower courts, the protections afforded Canham by the tripartite proof structure would be severely diluted.

The opinions below in this case have misinterpreted the structures of proof in Title VII cases. The misconceptions on which these incorrect lower court rulings are based must be put to rest by this Court. This Petition should be granted, the full record here examined and the decision appealed from should be reversed.

Respectfully submitted,

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Appendix

APPENDIX A

Memorandum Opinion and Order of the District Court

(Filed January 16, 1980)

Civil Action C79-204

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLEVE CANHAM,
Plaintiff,

vs.

OBERLIN COLLEGE,
Defendant.

MEMORANDUM OPINION AND ORDER

CONTIE, *J.*

The plaintiff Cleve Canham claims discrimination in securing employment with the defendant Oberlin College because of his sex in violation of 42 U.S.C. 2000(e) et seq. The rejection of the application of the plaintiff occurred on February 7, 1975. On April 10, 1975, plaintiff filed his claim with the Equal Employment Opportunity Commission (EEOC). The EEOC issued a right to sue letter on January 4, 1979. The within action was commenced by the plaintiff on February 1, 1979. The Court finds it has jurisdiction of the within action.

REVIEW OF FACTS, FINDINGS OF FACTS, AND CONCLUSIONS OF LAW

In 1974 plaintiff was unemployed and was seeking a position. The plaintiff's wife was likewise unemployed and sought employment with Oberlin College. In the process of plaintiff's wife seeking employment, she became aware that the Oberlin Alumni Magazine had a job available as assistant editor. The requisite qualifications were experience in the field of journalism, ability to use a typewriter, and familiarity with Oberlin College. The plaintiff had experience in the field of journalism and had ability to use a typewriter, but did not have any familiarity with Oberlin College.

Further the plaintiff had experience as the Sunday editor of the Lorain Journal, a daily newspaper.

Plaintiff applied for the position and was interviewed by Mr. Phillip Tear, the editor of the Alumni Magazine. Mr. Tear rated the plaintiff as his first choice to fill the position and, accordingly, made his recommendation to the administrative officer in charge of hiring. The affirmative action officer filed a negative report and noted that a female had likewise been interviewed by Mr. Tear and was rated as Mr. Tear's second choice.

The affirmative action officer, Karen Gorsline, advised Mr. Tear that when candidates were equally well qualified, the Affirmative Action Program provides for the appointment of a woman or a minority. Mr. Tear took no further action at that time regarding the negative report; but in lieu thereof, hired the plaintiff as the assistant editor on a temporary basis. The plaintiff was hired in December 1974.

In February, 1975, Mr. Tear prepared a second preferential list in which he listed his first choice as a black

female, his second and third choice as females, and the plaintiff as his fourth choice to fill the vacant position. The black female listed as number one had rejected the position. Jane Spiegelberg, one of the females listed ahead of the plaintiff, was given the position and the plaintiff's services as temporary assistant were terminated.

Mr. Tear indicated that during his working experience with the plaintiff from December 1974 to early February 1975, he determined that the plaintiff was not the right individual for the job. Mr. Tear determined that the plaintiff was qualified as a journalist, but the working relationship between the plaintiff and Mr. Tear revealed that a small amount of plaintiff's time was occupied with straight journalism. Mr. Tear indicated that the plaintiff did not carefully attend to the montonous task of writing class notes and obituaries. Mr. Tear further indicated that he had to spend extensive time rewriting the items written by the plaintiff. He indicated that this formed the basis of his rating plaintiff as his fourth choice in the February 1975 preferential list.

Even though there had been some dialogue by Mr. Tear, Ms. Gorsline and the administrative officer of Oberlin College in December 1974, no decision was made to employ anyone at that time. The question of the sex of the candidates for the position brought about a deferment of the selection until February 1975. In February 1975 it was determined by Mr. Tear that the plaintiff did not apply the qualifications which he possessed and that he was not the best person for the job. The selection of the candidate took place in February, and it was not based upon sex.

Mr. Canham's rating as number four on the preferential list was based upon his performance after a trial period in the position of assistant editor.

The Alumni Magazine office was a two person office and the duties of assistant editor were obviously diversified. It was Mr. Tear's determination after his working experience with the plaintiff that the plaintiff was not the right person for the job. It could be said that the plaintiff was overqualified for the job and the position called for minimum straight journalism and required multiple administrative duties. Also, the position requires some familiarity with Oberlin College which the other candidates possessed and Mr. Canham did not.

The plaintiff claims he made out a prima facie case. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Court finds that the plaintiff does not meet the test of *McDonnell-Douglas, supra,* in that he does not belong to a racial minority. Secondly, the Court finds that if the plaintiff did meet *McDonnell-Douglas, supra,* test by being a member of a protected class, that he has not made out a prima facie case.

The selection of an employee to fill the job was made in February 1975. The choice in February 1975 was based upon the known qualifications of the candidates at that time. The decision by Mr. Tear to rate the plaintiff as his number four choice was based upon Mr. Tear's working experience with the plaintiff and his knowledge of the plaintiff's qualifications in February 1975 as opposed to his knowledge of the plaintiff's ability in December 1974.

The Court concludes that the plaintiff did not present credible evidence that the defendant exercised sex discrimination against the plaintiff, and finds that the plaintiff has failed to prove a prima facie case of sex discrimination.

The Court makes the following alternate finding. The Court finds that if the plaintiff succeeded in making a prima facie case, it would be incumbent upon the defen-

dant to articulate nondiscriminatory business reasons for the defendant's actions. The Court finds that the defendant has articulated nondiscriminatory business reasons for the defendant's action and finds that said reasons are not a pretext for sex discrimination. *Brown v. Ralston Purina Co.*, 557 F.2d 570 (6th Cir. 1977). The burden of proof remains with the plaintiff to prove sex discrimination. *Board of Trustees v. Sweeney*, 33 S.Ct. 295 (1978).

The Court finds that the plaintiff has failed to maintain his burden of proof to prove that the defendant's conduct was discriminatory, and has failed to prove that the defendant's conduct was a pretext for sex discrimination.

The Court further concludes that the instant case bears some similarity to *United Steelworkers of America, etc. v. Brian F. Weber, et al.*, 47 Law Week 4851 (June 1979). ..... U.S. ..... The Supreme Court in *United Steelworkers, supra*, concluded that the voluntary affirmative action programs are not per se prohibited by Title VII, and in carrying out such plans, the employer is not per se violating the letter or spirit of 42 U.S.C. 2000(e), et seq. The Supreme Court in *United Steelworkers, supra*, indicated that it is permissible for an employer to enter into a voluntary affirmative action program to offer opportunities to minorities in occupations which have been traditionally closed to them. The Supreme Court further indicated that there are certain lines of demarcation, and affirmative action programs may fall on a permissive side of the line if the plan does not unnecessarily trammel the interest of other employees who are not in a protected class. In the instant case, the other persons rated on the preference list of February 1975 were regarded as having superior qualifications to the plaintiff. The Court finds that the plaintiff cannot claim that his interests were trammeled.

The Court concludes that the plaintiff has failed to maintain his burden of proof by proving that the defendant discriminated against him by reason of sex in his employment as assistant to the editor of the Oberlin College Alumni Magazine. Judgment is therefore rendered for the defendant and against the plaintiff.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.
LEROY J. CONTIE, JR.
U. S. District Judge

APPENDIX B

Decision and Opinion of the Court of Appeals

(Decided and Filed December 22, 1981)

No. 80-3186

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLEVE CANHAM,
Plaintiff-Appellant,

v.

OBERLIN COLLEGE,
Defendant-Appellee.

APPEAL From the United States District Court for the Northern District of Ohio.

Before: MERRITT and JONES, *Circuit Judges*, and PHILLIPS, *Senior Circuit Judge*.

PHILLIPS, *Senior Circuit Judge*. Appellant Cleve Canham, a white male, filed this action alleging that appellee, Oberlin College, discriminated against him on account of his sex when it refused to hire him for the position of Assistant Editor of Oberlin's *Alumni Magazine*. The district court found that Oberlin had articulated legitimate, non-discriminatory reasons for not hiring the appellant and that appellant had failed to prove that these reasons were a pretext for sex discrimination. We affirm.

Appellant Canham first applied for the job of assistant editor in the fall of 1974, after his wife informed him that the College was advertising for the position on one of its bulletin boards. Canham previously had worked on several newspapers but at that time was unemployed and looking for work in the Oberlin, Ohio, area. The advertisement listed as qualifications a bachelor's degree, the ability to use an electric typewriter and familiarity with the College's organization, administration, history, personalities and campus politics. The advertisement also stated that the new assistant editor's duties would include proofreading, layout, interviewing and writing feature articles, class notes and obituaries.

On the basis of his written application, appellant was invited to an interview by Philip Tear, Editor of the *Alumni Magazine*. After this interview Mr. Tear rated the appellant as his first choice among all the applicants for the job, largely because of the appellant's journalism experience. He submitted his recommendation to the personnel department but received a negative review from the affirmative action officer, Ms. Karen Gorsline. In an interoffice memorandum, Ms. Gorsline reminded Mr. Tear that the College had established an affirmative action goal to recruit and hire, if possible, minority candidates in the College's *Alumni Magazine* office, due to the considerable disparity between the percentage of minority group members in the local population and the percentage holding administrative and technical positions in the College. The memorandum also noted that a black female candidate, Ms. Chaille Maddox, who ranked second on the list, appeared to be equally well or even better qualified than the appellant. Although she did not have as much journalism experience as appellant, she did have an extensive familiarity with Oberlin College, which the appellant

lacked. Ms. Gorsline's memorandum concluded that "the principles of Affirmative Action require that where two candidates are equally well qualified by criteria set by the recruiter and under an Affirmative Action goal, that [sic] the woman or minority is to be given preference." Ms. Gorsline thus rejected Tear's recommendation, but invited him to inform the personnel office if he had omitted any pertinent information on the forms submitted to the office.

Rather than reject the application of appellant and hire Ms. Maddox, Mr. Tear received permission to hire both the appellant and Ms. Maddox on a temporary, trial basis in early December 1974. Because Ms. Maddox had another temporary job that occupied most of her time, appellant functioned as a virtual full time assistant to Mr. Tear from December 1974 through February 1975.

During Canham's tenure as assistant editor, Mr. Tear apparently became disenchanted with Canham's performance of the job. Mr. Tear testified that the appellant did not take very well to the mundane and often monotonous tasks of writing obituaries and class notes, and that he, Tear, found himself rewriting much of his assistant's work. Mr. Tear concluded that the appellant's journalism experience may have been more of an over qualification than a qualification, in view of the tedious nature of the duties of the assistant.

In February 1975, Tear drew up a new ranking of candidates for the position. He dropped appellant Canham to fourth on the list, elevated Ms. Maddox, his former second choice, to first choice and promoted two other females to second and third place, ahead of the appellant. Each of these female candidates, like Ms. Maddox, had the

additional desired qualification of familiarity with Oberlin College.

Ms. Maddox then was offered the job but refused it. The second candidate on the list, a white female, was offered the job and accepted, whereupon appellant's application was formally rejected.

Appellant then filed a complaint with the EEOC, and upon receiving a right to sue letter, filed this timely action in the district court, claiming that the college discriminated against him because of his sex, and that the college's affirmative action program was unlawful as applied to his case.

Appellant's allegations amount to a claim of disparate treatment, which in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), was declared unlawful under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. The district court found that the appellant did not establish a prima facie case because he was not a member of a minority group and because he had been found to be unqualified for the position after his trial employment. The court went on to conclude, however, that even if the appellant had established a prima facie case, the defendant had succeeded in rebutting the inference of discrimination, and the appellant had failed to show that the college's asserted reasons were pretextual.

In a recent decision clarifying the allocation of the burden of proof in disparate treatment cases, the Supreme Court has described the prima facie case of the plaintiff in this manner:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she

> applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.
>
> (Footnote omitted.) *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

The Court also footnoted the *McDonnell-Douglas* formulation:

> In *McDonnell-Douglas, supra*, we described an appropriate model for a prima facie case of racial discrimination. The plaintiff must show:
>
> > "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S., at 802.
>
> We added, however, that this standard is not inflexible, as "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations." *Id.*, at 802, n. 13.
>
> In the instant case, it is not seriously contested that respondent has proved a prima facie case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male, Walz, who had been under her supervision. *Id.* 253-54, n. 6.

For purposes of this opinion we assume, but do not decide, that appellant has stated a prima facie case of disparate treatment.

Once a plaintiff establishes his prima facie case:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.
>
> *Burdine, supra*, 450 U.S. at 254.

The Supreme Court has defined the defendant's burden in these terms:

> To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.
>
> (Footnotes omitted.) *Id.* at 255.

The district court found that Oberlin's decision not to hire the appellant was based on his unsatsifactory performance during the trial period of December 1974-February 1975. The court also found that appellant's journalism experience may have rendered him over qualified, rather than qualified, for the job, and that the other candidates possessed an important qualification, familiarity with the Oberlin campus, which the appellant did not have.

These findings support the decision of the district court that the College acted upon legitimate, nondiscriminatory reasons, and not upon discriminatory intent, in its decision not to hire the appellant. Essentially, the record shows that the trial employment of appellant was terminated for cause and not for any intention to discriminate against him because of his sex.

The appellee Oberlin College carried its burden of proof under *Burdine, supra,* to articulate a legitimate, nondiscriminatory reason when it offered these reasons—appellant's unsatisfactory trial performance and the other candidates' additional qualifications—in explanation of its

refusal to hire the appellant. The burden then shifted back to appellant

> * * * to demonstrate that the proffered reason was not the true reason for the employment decision. * * * [He] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, supra, 450 U.S. at 256.

When the district court found that the College actually based its decision on the proffered reasons, this finding effectively negatived any contention by the appellant that these reasons were pretextual or discriminatory. The plaintiff bears at all time the burden of persuasion, *Burdine, supra,* 450 U.S. at 256. Appellant failed to persuade the district court that the College's asserted reasons were pretextual or its motivation discriminatory. The appellant has failed to persuade us that the findings of fact of the district court are clearly erroneous. Fed. R. Civ. P. 52(a).

The appellant also contends that the College's affirmative action program was unlawful as applied in his case. Because we agree with the district court that the employment decision took place in February 1975, after appellant's unsatisfactory trial employment, and not in December 1974, when the personnel office disapproved Mr. Tear's original ranking of the candidates, we conclude that the decision was based on the College's assessment of the relative qualifications of the candidates, and not on a desire to implement its affirmative action goals at the expense of the appellant. "[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Burdine, supra,* 450

U.S. at 259. The employer has a similar discretion to choose among candidates with different but equally desirable qualifications. Therefore, it is not necessary to decide whether the alleged implementation of affirmative action goals as characterized by the appellant in his brief would be unacceptable under Title VII.

The judgment of the district court is affirmed.

Opposition

Supreme Court, U.S.
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CLEVE CANHAM,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. The Trial Court's Findings Of Fact Should Not Be Set Aside And Were Properly Upheld By The Court Of Appeals 5

II. The Trial Court Properly Applied The Standards Set Forth In *McDonnell-Douglas Corp. v. Green* And Determined That Petitioner Failed To Establish A Prima Facie Case, And Alternatively, That Even If A Prima Facie Case Had Been Presented, Respondent Demonstrated Nondiscriminatory Business Reasons For Its Decision Not To Hire Petitioner 8

III. The Trial Court's Decision In This Matter Was A Factual Determination And As Such Does Not Present An Issue Of Great Precedential Value Which Merits Review By This Court 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Brown v. Ralston Purina Co., 557 F.2d 570 (6th Cir. 1977) 6, 9
Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948) 7
Falkner v. Gibbs, 338 U.S. 267 (1949) 7
Henry v. Ford, 553 F.2d 46 (8th Cir. 1977) 9
J. A. Jones Constr. Co. v. Englert Eng. Co., 438 F.2d 3 (6th Cir. 1971) 5
Keyes v. School District No. 1, Denver Colorado, 413 U.S. 189, 264 (1973) 7
McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 8, 9
Neil v. Biggers, 409 U.S. 188 (1972) 7
Olson v. Philco-Ford, 551 F.2d 474 (10th Cir. 1976) 6
Potter v. Goodwill Industries of Cleveland, 518 F.2d 864 (6th Cir. 1975) 6, 9, 10
Rudolph v. United States, 370 U.S. 269, 271 (1962) 7
Teague v. City of St. Louis, 615 F.2d 773 (8th Cir. 1980), *cert. den.* 449 U.S. 901 (1980) 5
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 9
United Steelworkers of America, etc. v. Weber, et al., 443 U.S. 193 (1979) 12

Additional Authorities

42 U.S.C. 2000(e) 12
Rule 52(a), Federal Rules of Civil Procedure 5
WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §2585 5

No. 81-1816

In the Supreme Court of the United States

October Term, 1981

CLEVE CANHAM,
Petitioner,

vs.

OBERLIN COLLEGE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In October, 1974, the staff of the Oberlin College *Alumni Magazine* consisted of two people, the editor Philip Tear and one assistant. At that time, Tear learned that his assistant would be leaving. Over the years, Mr. Tear had hired numerous persons for this position. The fall of 1974, however, was the first time he was required to use forms provided by the personnel department for the hiring process.

Mr. Tear began by completing a Staff Opening Report Form. In the process, he established the criteria upon which the hiring decision was to be based. As specified on that form, the required qualifications were the ability to use an electric typewriter and an A.B. degree or its equivalent. The desired qualifications were a knowledge of college organization and familiarity with Oberlin's history, its campus politics and its personalities.

The position was advertised, applications were screened by the personnel department and forwarded to Mr. Tear. Philip Tear then interviewed the candidates and on December 2, 1974, he ranked them in order of his preference. He placed a "1" beside the name of Cleve Canham indicating him to be the first preferred candidate.

At the time, Cleve Canham was unemployed. He had held several jobs, the most recent of which was as the Sunday editor of the *Lorain Journal*, a daily newspaper.

Philip Tear's listing of candidates was reviewed by the Affirmative Action officer in the personnel department to determine whether on the face of the form there was any apparent discrimination.* Mr. Tear preferred Mr. Canham, a Caucasian male, over his second choice, Chaille Maddox, a Black female who seemed to have the same qualifications. In stating a reason for this preference on the form, Mr. Tear expressed the opinion that Mr. Canham had greater training and experience in journalism. Training and experience in journalism had *not* been set forth as required or desired qualifications for the job and, therefore, were not factors which the Affirmative Action officer

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*The form itself contains a section in the upper left-hand corner which specifies whether the position falls within Affirmative Action goals and the general nature of those goals. In this case, the job fell under a minorities goal but did *not* fall under an Affirmative Action goal with respect to the applicant's sex.

could consider in review of the ranking. Furthermore, it was clear from a review of the applications that Miss Maddox was familiar with the Oberlin campus and Mr. Canham was not. The form was returned to Mr. Tear with a negative review.

Mr. Tear persisted in his personal opinion that Mr. Canham was suited for the job because of his extensive background in journalism. This being the case, Mr. Tear had at least two options sanctioned by the personnel department: (1) He could present the accumulated information and documents in an appeal to the Director of Personnel, Mr. Emmanuel Harris, or, (2) He could readvertise the job, this time adding journalism as a qualification.

Rather than pursuing either course of action, Mr. Tear sought and obtained permission to hire Mr. Canham and Miss Maddox each on a part-time basis for a trial period. As it happened, Miss Maddox had another temporary job which occupied much of her time, and Mr. Canham began to function as Mr. Tear's full-time assistant. During the period the two men worked together on a daily basis, Mr. Tear decided that he did not wish to hire Mr. Canham. Mr. Tear realized that Mr. Canham was overqualified for the job and that his extensive experience was more of an impediment than an asset to the job.

As Heide McClellan Rothschild, a former assistant to Mr. Tear, characterized the job, it was "an apprenticeship type of position" which involved opening mail, working on circulation lists, assisting at alumni functions, attending college committee meetings and helping with the annual fund and commencement. A maximum of only 20 percent of the assistant's time was spent on writing.

During the time Mr. Canham served as Mr. Tear's assistant, it was apparent to Mr. Tear that Canham did not attend carefully to the work he was assigned. Mr.

Tear found that he had to do considerable editing of Mr. Canham's work. Mr. Canham's careless handling of the obituaries and class notes proved to be "quite normal for someone who had had experience as a reporter or an editor and was just more interested in doing the so-called better stuff." Mr. Tear ended up writing all the class notes, a mechanical chore but one which required precision and concern so as to make interesting reading for the alumni.

Additionally, Mr. Tear came to realize that even he, as editor, spent less than half his time actually working on the magazine and that experience in journalism was not necessary for the job as his assistant. Half of Mr. Tear's time and that of his assistant involved public relations rather than journalism. Based on direct personal experience, Mr. Tear decided Mr. Canham was simply not suited for the position. Therefore, in February, 1975, after working closely with Canham and observing his work, Mr. Tear prepared a second preferential list placing three candidates who had more familiarity with the Oberlin campus above Mr. Canham. One of these candidates accepted the position.

Mr. Tear's decision not to hire Mr. Canham was based upon his personal observation and evaluation of Mr. Canham's work. It is clear and undisputed that this decision not to hire Mr. Canham was Mr. Tear's and that it was reached during the time he was working with Mr. Canham. The record is devoid of any discriminatory motive for Philip Tear's decision. Mr. Canham was rejected simply because Mr. Tear observed his work and felt he was not suited to the job.

Petitioner limited his allegations to discrimination because of sex; he is male. He did not allege discrimination based on his race; he is white.

REASONS FOR DENYING THE WRIT

I. THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE SET ASIDE AND WERE PROPERLY UPHELD BY THE COURT OF APPEALS.

Rule 52(a), Federal Rules of Civil Procedure provides in part:

> In all actions tried upon the facts without a jury . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

In the matter at hand, the trial court heard the evidence and stated the findings of fact upon which its Order was based. Rule 52(a), Federal Rules of Civil Procedure states that "findings of fact shall not be set aside unless clearly erroneous." Thus, the court's findings are presumptively correct and were properly upheld by the Circuit Court. *J. A. Jones Constr. Co. v. Englert Eng. Co.*, 438 F.2d 3, 5 (6th Cir. 1971). *See also*, WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, §2585.

As noted by the Circuit Court, the trial court had substantial evidence upon which it based the finding that appellee presented valid nondiscriminatory justification for its actions. These findings should not be overturned unless "clearly erroneous."

In *Teague v. City of St. Louis*, 615 F.2d 773 (8th Cir. 1980), *cert. den.* 449 U.S. 901 (1980), a Black female employee sought reversal of the district court's determination that her employer had rebutted her prima facie case of discrimination. The case was affirmed, the court stating at 615 F.2d 773, 775:

> Plaintiff argues that defendant failed to produce enough evidence to rebut her prima facie case. She asserts there was insufficient evidence to establish her absences, her refusals to work alone, and a refusal to work in the field. *There was, however, evidence in the record to support the trial judge's conclusion that these events occurred. We cannot say that his findings here are clearly erroneous.* (Emphasis added.)

Similarly, the dismissal of a sex discrimination case at the close of plaintiff's evidence was upheld in *Olson v. Philco-Ford,* 531 F.2d 474 (10th Cir. 1976) where at page 476 of its opinion the court stated:

> The clearly erroneous standard determines the validity of the findings. In applying that standard the test is whether the appellate court is left 'with the definite and firm conviction that a mistake has been committed.' *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123, 89 S. Ct. 1562, 1576, 23 L. Ed. 2d 129. *The court of appeals does not decide factual issues de novo. Ibid.* (Emphasis added.)

The "clearly erroneous" standard was also applied in *Brown v. Ralston Purina Co.,* 557 F.2d 570 (6th Cir. 1977) where appellant's case was tried to the court. On review, the Court of Appeals stated at 557 F.2d 570, 573:

> The transcript of the two hearings simply affords no basis for our holding that the findings of fact of the District Judge are clearly erroneous. . . .

See also, Potter v. Goodwill Industries, 518 F.2d 864 (6th Cir. 1975).

In the case at bar, the District Judge was the trier of fact. His ruling was based upon the evidence and testimony before him. The record substantiates his findings; and, as stated by the Circuit Court in its Opinion,

these findings should not be set aside unless clearly erroneous. A review of the petitioner's argument reveals that his dispute is not with questions of law, but of fact. These questions have been correctly determined, upheld on appeal and need no further determination by this Honorable Court.

In addition, the "two court" rule makes the concurrent findings of the District Court and the Circuit Court final, thereby precluding the granting of a Writ of Certiorari in the case at bar.

The "two-court" rule, which makes the concurrent findings of the two courts below final in the absence of a very exceptional showing of error has been described repeatedly as "seasoned and wise." *Comstock v. Group of Institutional Investors*, 335 U.S. 211 (1948). In that case, as in the instant case

> Much of petitioner's argument seems . . . to invite us to reach conclusions from the voluminous record in the case, contrary to those reached by the two courts below. 335 U.S. at 213.

In refusing to do so, the Court held that it was precluded by the concurrent findings of the District Court and Circuit Court and dismissed the Writ of Certiorari.

The cases cited in *Comstock* (see 335 U.S. at 214), and the cases which subsequently cite it as precedent, confirm its initial vigor and its continuing vitality. *Falkner v. Gibbs*, 338 U.S. 267 (1949); *Rudolph v. United States*, 370 U.S. 269, 271 (1962); *Neil v. Biggers*, 409 U.S. 188 (1972); *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 264 (1973).

Thus, the facts as found by the courts below are presumptively correct and serve as no basis for this Court to grant a Writ of Certiorari.

II. THE TRIAL COURT PROPERLY APPLIED THE STANDARDS SET FORTH IN McDONNELL-DOUGLAS CORP. v. GREEN AND DETERMINED THAT PETITIONER FAILED TO ESTABLISH A PRIMA FACIE CASE, AND ALTERNATIVELY, THAT EVEN IF A PRIMA FACIE CASE HAD BEEN PRESENTED, RESPONDENT DEMONSTRATED NONDISCRIMINATORY BUSINESS REASONS FOR ITS DECISION NOT TO HIRE PETITIONER.

The trial court properly applied the standards set forth in *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973) and determined that petitioner did not meet the first requirement of that case, *i.e.* he did not establish a *prima facie* case of discrimination.

In his Memorandum Opinion and Order, Judge Contie stated:

> The plaintiff claims he made out a prima facie case. *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973). The court finds that the plaintiff does not meet the test of *McDonnell-Douglas, supra,* in that he does not belong to a racial minority. Secondly, the Court finds that if the plaintiff did meet *McDonnell-Douglas, supra,* test by being a member of a protected class, that he has not made out a prima facie case.

The trial court applied *McDonnell-Douglas* and concluded Mr. Canham did not meet its test. Petitioner focuses on the trial court's use of the phrase "racial minority" in the above-quoted language and would have this court believe that the trial court did not recognize the applicability of *McDonnell-Douglas* to cases of alleged sex discrimination. It is clear from the very next sentence

of the Opinion (*supra*) that the trial court utilized the concept of "a protected class" (not just a "racial minority") and fully applied *McDonnell-Douglas* to the matter at hand.

In sum, the court applied *McDonnell-Douglas* and concluded that appellant "did not present credible evidence that the defendant exercised sex discrimination against the plaintiff."

As set forth in *Henry v. Ford*, 553 F.2d 46 (8th Cir. 1977), a prima facie case is established ". . . if the net of evidence adduced by both parties leaves the fact finder *convinced* that there has been disparate treatment . . ." (Emphasis added). In the matter at hand, as affirmed by the Circuit Court, a prima facie case was not established.

If a prima facie case were established, the *McDonnell-Douglas* standard utilizes a burden of proof which then shifts to the employer. The employer may rebut a prima facie showing of discrimination by demonstrating a nondiscriminatory purpose of its actions. *McDonnell-Douglas, supra,* at 4411 U.S. 792, 802; *Potter v. Goodwill Industries of Cleveland,* 518 F.2d 846, 865 (6th Cir. 1975). While the burden may shift, it must be stressed that the ultimate burden of persuasion remains with the plaintiff. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981)

In the instant case, the trial court properly applied the shifting burden of production and held:

> The court finds that if the plaintiff succeeded in making a prima facie case, it would be incumbent upon the defendant to articulate nondiscriminatory business reasons for the defendant's action and finds that said reasons are not a pretext for sex discrimination. *Brown v. Ralston Purina Co.*, 557 F.2d 570 (6th Cir. 1977).

The record is replete with facts upon which the trial court based its determination that appellee's decision not to hire Mr. Canham was for valid nondiscriminatory reasons.

Mr. Tear realized that his two-person office engaged in more public relations work than actual writing. He needed an apprentice, not a seasoned journalist. Mr. Canham had no previous experience with Oberlin College and his work was not satisfying to Mr. Tear. The decision not to hire Canham was not based on appellant's sex, but upon the work he performed.

In *Potter v. Goodwill Industries of Cleveland,* 518 F.2d 864 (6th Cir. 1975), the district court held that plaintiff had not made out a prima facie case. The trial court then considered the entire record and held that even if a prima facie case had been made, it had been rebutted; the action was dismissed. The dismissal was affirmed although the Court of Appeals held that plaintiff *had* set forth a prima facie case. At 518 F.2d 864, 865, the court stated:

> Although the district court, in its oral opinion, erroneously stated that plaintiff had not made out a prima facie case of discrimination in conditions of employment, we conclude that *it did not err in dismissing the complaint after hearing all the evidence adduced at trial. The court, upon consideration of the entire record, expressly determined that even if plaintiff had established a prima facie case, the defendant rebutted the demonstration* by showing that it had provided plaintiff with a stool during her employment, that it was not responsible for the stool's disappearance at times, and that plaintiff's employment was terminated

because of her apparent unwillingness and inability to perform available tasks. *These findings are not clearly erroneous.* (Emphasis added.)

Similarly, even if petitioner had established a prima facie case in the matter at hand, his cause would fail, for respondent presented valid nondiscriminatory business reasons for its actions.

III. THE TRIAL COURT'S DECISION IN THIS MATTER WAS A FACTUAL DETERMINATION AND AS SUCH DOES NOT PRESENT AN ISSUE OF GREAT PRECEDENTIAL VALUE WHICH MERITS REVIEW BY THIS COURT.

One of the primary functions of this Court is to review cases with great precedential value so as to set guidelines for future judicial action. In the case at hand, where the determination of the trial court and the Court of Appeals was essentially that of a factual nature, the case has no precedential value. The courts below correctly applied existing legal standards. No new legal issues were raised nor explored; the trial court simply assessed the testimony presented and made certain factual conclusions in light of accepted principles. The decisions of the courts below do not present issues to be reviewed by this Court.

CONCLUSION

Petitioner does not contend that Oberlin's Affirmative Action Plan is illegal, but states that it was applied incorrectly. The fact of the matter is, quite simply, that Affirmative Action had no effect whatsoever on the decision ultimately reached.

The trial court noted the similarity of the matter at hand to *United Steelworkers of America, etc. v. Weber, et al.*, 443 U.S. 193 (1979). In *Weber*, this Court concluded that voluntary affirmative action programs are not prohibited per se by Title VII and that in carrying out such plans, an employer is not per se violating the letter or spirit of 42 U.S.C. 2000(3), *et seq.* Voluntary affirmative action programs are permissible to offer opportunities to minorities in situations where such opportunties may have been traditionally closed. As the trial court stated in examining the Affirmative Action Plan in the case at bar:

> The Supreme Court further indicated that there are certain lines of demarcation, and affirmative action programs may fall on a permissive side of the line if the plan does not unnecessarily trammel the interest of other employees who are not in a protected class. In the instant case, the other persons on the preference list of February, 1975 were regarded as having superior qualifications to the plaintiff. The court finds that the plaintiff cannot claim that his interests were trammeled.

It is thus evident that the court examined the testimony and determined as a finding of fact that appellant's interests had not been "unnecessarily trammeled" by Oberlin's Affirmative Action Program.

Philip Tear made the decision not to hire Mr. Canham. Petitioner does not dispute this fact. As Mr. Canham stated in his petition at page 4, "During Canham's temporary tenure as Assistant Editor, Tear abandoned his efforts to hire Canham on a permanent basis." Had Mr. Tear remained constant in his desire to have Mr. Canham as his assistant, he had options available to him: he could have appealed to the personnel director or he could have readvertised the job. He did neither. After working with Canham, Tear realized that Canham's experience and performance did not make him the most preferable candidate for the job. The decision not to rank Canham as his first choice was a personal matter for Tear, based upon his evaluation of Mr. Canham's work.

The district court, as the trier of fact herein and as affirmed by the Circuit Court, determined from ample evidence that respondent had valid nondiscriminatory reasons for choosing not to hire petitioner. For these reasons, respondent respectfully urges that the Petition for Certiorari be denied.

Respectfully submitted,

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